

12-19-2008

Judd v. State Respondent's Brief Dckt. 34408

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Judd v. State Respondent's Brief Dckt. 34408" (2008). *Idaho Supreme Court Records & Briefs*. 1929.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1929

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

JOHN A. JUDD,

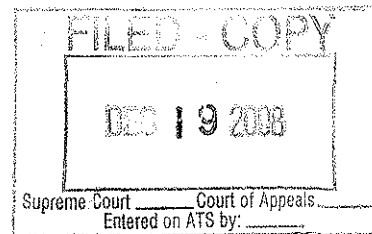
Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 34408



BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

**HONORABLE PETER D. MCDERMOTT
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division**

**JOHN C. MCKINNEY
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
RESPONDENT**

**HEATHER M. CARLSON
State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712**

**ATTORNEY FOR
PETITIONER-APPELLANT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUE	3
ARGUMENT	4
Judd Has Failed To Meet His Burden Of Establishing That The District Court Abused Its Discretion In Denying His Motion For Appointed Counsel	4
A. Introduction.....	4
B. Standard Of Review	4
C. Applicable Legal Standards Under I.C. § 19-4904	5
D. Judd Failed To Meet His Burden Of Establishing The District Court Abused Its Discretion In Denying His Motion For Appointment Of Counsel	6
CONCLUSION	11
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Brown v. State</u> , 135 Idaho 676, 23 P.3d 138 (2001)	5
<u>Charboneau v. State</u> , 140 Idaho 789, 102 P.3d 1108 (2004)	5, 6, 7, 8
<u>Charboneau v. State</u> , 144 Idaho 900, 174 P.3d 870 (2007)	10
<u>Evensiosky v. State</u> , 136 Idaho 189, 30 P.3d 967 (2001)	9
<u>Freeman v. State</u> , 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992)	10
<u>Newman v. State</u> , 140 Idaho 491, 95 P.3d 642 (Ct. App. 2004)	6
<u>Plant v. State</u> , 143 Idaho 758, 152 P.3d 629 (Ct. App. 2007)	4
<u>Sayas v. State</u> , 139 Idaho 957, 88 P.3d 776 (Ct. App. 2003)	10
<u>Schwartz v. State</u> , 145 Idaho 186, 177 P.3d 400 (Ct. App. 2008)	9
<u>State v. DuValt</u> , 131 Idaho 550, 961 P.2d 641 (Ct. App. 1998)	9
<u>State v. Kirkwood</u> , 111 Idaho 623, 726 P.2d 735 (1986)	9
<u>Swader v. State</u> , 143 Idaho 651, 152 P.3d 12 (2007)	5
<u>Swisher v. State</u> , 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996)	8, 10
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007)	6
 <u>STATUTES</u>	
I.C. § 18-6501	1
I.C. § 19-4902	9, 10
I.C. § 19-4904	4, 5
I.C. § 19-4906	2
I.C. § 19-4908	10
I.C. § 19-4209	9

STATEMENT OF THE CASE

Nature Of The Case

John A. Judd appeals from the order of the district court denying his request for post-conviction counsel and dismissing his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The district court set forth the factual and procedural background of Judd's underlying criminal case and post-conviction proceeding as follows:

John A. Judd ("the Petitioner" or "Mr. Judd") entered a guilty plea to one count of SEXUAL ABUSE OF A MINOR CHILD UNDER SIXTEEN in violation of Idaho Code ("IC") § 18-6501(b). On September 28, 1998, Mr. Judd was sentenced by this Court to a fixed period of confinement of five (5) years and a subsequent indeterminate period of ten (10) years, for a total of fifteen (15) years. Thereafter, on April 20, 2000, the Petitioner filed a Motion for Correction or Reduction of Sentence pursuant to Rule 35 of the Idaho Criminal Rules ("ICR"). On or about January 5, 2001, this Court denied that Rule 35 Motion as untimely. On March 20, 2007, the Petitioner filed a Petition for Post Conviction Relief, alleging ineffective assistance of counsel. Mr. Judd based that claim on the following grounds:

(a) Counsel failed to advise the court that he was a minor at the time of the crime. Petitioner was 17 years old. (b) Counsel failed to appeal the sentence which [sic] was excessive and failed to file Rule #35 [sic] upon petitioners [sic] request. (c) Counsel failed to advise the court of the conflict of interest. The petitioners [sic] father was sentenced by Judge in same type crime in 1985.

On April 6, 2007, this Court issued an Order denying Mr. Judd's Petition for Post Conviction Relief, dismissing the same with prejudice because the time for filing a Petition for Post Conviction Relief had expired. Subsequently, the Petitioner filed a Notice of Appeal, and this Court then appointed the State Appellate Public Defender's Office to represent Mr. Judd. On or about February 13,

2008, the Respondent, State of Idaho, filed a Motion for Remand, requesting "an order remanding this case to the district court and an order staying the briefing schedule until after the district court's final action on remand." Pursuant to that motion, the State argued that because this Court did not provide the Petitioner with twenty (20) days notice of its intent to dismiss as required by IC § 19-4906(b), this case should be remanded so that this Court could provide such notice.

(Notice of Intent to Dismiss, filed 4/9/08, pp.1-2 (internal citations omitted, internal quotes verbatim).)

The Idaho Supreme Court remanded Judd's post-conviction case to the district court, which issued a Notice of Intent to Dismiss and gave Judd twenty days to respond. (Notice of Intent to Dismiss, filed 4/9/08.) According to the district court, Judd thereafter filed an affidavit and motion for the appointment of counsel, and a response to the dismissal notice.¹ (See Order, filed 7/3/08, pp.1-2.) On July 3, 2008, the district court filed an order in which it: (1) stated that Judd had filed an affidavit and motion "which this Court considered and herewith DENIES the appointment of counsel," and (2) dismissed Judd's post-conviction petition with prejudice because it was not filed timely and the court lacked jurisdiction to consider Judd's claims. (Id., p.2.)

Judd appeals the denial of his motion for the appointment of counsel and dismissal of his post-conviction petition.²

¹ The response to the district court's notice of intent to dismiss has not been made part of the record on appeal.

² Although Judd's most recent (i.e., after remand) notice of appeal has not been made a part of the record on appeal, such notice does not appear to have been necessary in light of the fact that the original appeal was remanded to the district court and the briefing schedule was stayed pending final action on remand. (Order Granting Motion for Remand and Motion to Stay Briefing Schedule, signed 3/19/08, filed with Idaho Supreme Court.)

ISSUE

Judd states the issue on appeal as:

Did the district court err when it failed to rule on Mr. Judd's motion for appointment of counsel prior to dismissing his post-conviction petition?

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Judd failed to meet his burden of establishing the district court abused its discretion in denying his motion for appointment of counsel?

ARGUMENT

Judd Has Failed To Meet His Burden Of Establishing That The District Court Abused Its Discretion In Denying His Motion For Appointed Counsel

A. Introduction

In the same written order, the district court both denied Judd's request for the appointment of counsel and dismissed his post-conviction petition. (Order, filed 7/3/08.) On appeal, Judd contends the district court erred in denying his motion for appointed counsel in his post-conviction relief proceeding without first determining whether to appoint counsel to assist him. (Appellant's brief, pp.6-9.) There is no legal authority to support Judd's argument that the two rulings by the district court could not be presented in the same order.³ In any event, Judd's post-conviction petition was plainly untimely; thus, he failed to raise the possibility of a valid claim, and cannot show any harm in the denial of his motion for appointed counsel. Given Judd's failure to raise the possibility of a valid claim, he has failed to meet his burden of establishing that the district court abused its discretion in denying his request for counsel.

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel to represent a post-conviction petitioner pursuant to I.C. § 19-4904 is discretionary. Plant v. State, 143 Idaho 758, 761, 152 P.3d 629, 632 (Ct. App. 2007). "In reviewing the denial of a motion for appointment of counsel in post-conviction

³ Judd does not assert that the district court erred in denying his motion to appoint counsel. Instead, Judd contends the *timing* of that ruling constituted error because it was not made prior to (vis-à-vis, in the same order as) the court's dismissal of his post-conviction petition.

proceedings, "[t]his Court will not set aside the trial court's findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review." Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004) (quoting Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001)).

C. Applicable Legal Standards Under I.C. § 19-4904

Post-conviction counsel should be appointed if the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf." Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. As Swader instructs:

When considering a motion for appointment of counsel, the trial court must do more than determine whether the petition alleges a valid claim. The court must also consider whether circumstances prevent the petitioner from making a more thorough investigation into the facts. An indigent defendant who is incarcerated in the penitentiary would almost certainly be unable to conduct an investigation into facts not already contained in the court record. Likewise, a *pro se* petitioner may be unable to present sufficient facts showing that his or her counsel's performance was deficient or that such deficiency prejudiced the defense. That showing will often require the assistance of someone trained in the law. *Therefore, the trial court should appoint counsel if the petition alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim.* The investigation by counsel may not produce evidence sufficient to survive a motion to dismiss. But, the decision to appoint counsel and the decision on the merits of the petition if counsel is appointed are controlled by two different standards.

143 Idaho at 654-55, 152 P.3d at 15-16 (emphasis added).

When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904, "permits the trial court to

determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. If, on the other hand, the claims are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel, the court may deny the motion for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Newman v. State, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004).

D. Judd Failed To Meet His Burden Of Establishing The District Court Abused Its Discretion In Denying His Motion For Appointment Of Counsel

In order to be eligible for appointment of counsel, Judd's petition had to present the possibility of a valid post-conviction claim. Charboneau, 140 Idaho at 793, 102 P.3d at 1112. Judd failed to do so, as the district court explained in its Notice of Intent to Dismiss:

As explained, a conviction was entered against Petitioner on September 28, 1998. He was allotted forty-two (42) days from that date in which to file an appeal. The Petitioner took no action until he filed his Rule 35 motion on April 20, 2000, nearly two full years after entry of his conviction. This Court denied that motion on January 5, 2001. His current Petition for Post Conviction Relief was not filed until March 20, 2007, well beyond the one-year period provided for the filing of such applications. Therefore, since Mr. Judd failed to file his Petition for Post Conviction Relief within the relevant time frame, that petition is barred.

(Notice of Intent to Dismiss, filed 4/9/08, p.5.) The district court's subsequent order of dismissal reaffirmed the futility of Judd's petition:

On May 5, 2008, this Court signed an Order dismissing the Petition as Petitioner had not responded to the Notice of Intent to Dismiss.

On May 8, 2008, Petitioner filed a Motion to Extend Time frame which was granted by this Court and Petitioner was given until July 8, 2008, to respond.

Petitioner thereafter filed an Affidavit and Motion for the appointment of counsel *which this Court considered* and herewith DENIES the appointment of counsel.

Petitioner filed a response to Notice to Dismiss and this Court concludes it does not have jurisdiction to consider Defendant's allegations as his Petition was not filed timely.

(Order, filed 7/3/08, pp.1-2 (emphasis added).)

On appeal, Judd does not assert his post-conviction petition was filed timely. Rather, he argues that the district court erred by failing to rule on his motion for appointment of counsel prior to dismissing his post-conviction petition. In his appellate brief, Judd cites and relies upon part of a sentence in Charboneau, quoting, "[a]t a minimum, the trial court must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition."⁴ Appellant's brief, p.7; cf. Charboneau, 140 Idaho at 792, 102 P.3d at 1111. However, it is clear from the very language of the district court's order that it had already "considered" Judd's motion for counsel prior to dismissing Judd's petition. (Order, filed 7/3/08, p.2 (Judd filed affidavit and motion for "the

⁴ The sentence quoted by Judd from Charboneau fully reads: "A court must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition and whether it contains new and admissible evidence." Charboneau, 140 Idaho at 792, 102 P.3d at 1111.

appointment of counsel which this Court *considered* and herewith DENIES” (emphasis added).) Judd’s contention that the district court failed to consider his request for counsel prior to dismissing his petition is not supported out by the record.

Nor has Judd presented any authority to support his contention that post-conviction courts are precluded from making an express ruling in regard to a motion for appointment of counsel within the same written order that denies post-conviction relief. Such a rule would be hyper-technical⁵ and would go much further than necessary to remedy the problem found in Charboneau -- where the district court had dismissed the post-conviction petition without making *any* ruling on Charboneau’s motion for appointment of counsel. Charboneau, 140, Idaho at 792, 102 P.3d at 1111.

Moreover, the dismissal of Judd’s post-conviction petition was inevitable regardless of whether his motion for appointment of counsel was granted; thus, he cannot demonstrate any prejudice in the district court’s ruling. In Swisher v. State, 129 Idaho 467, 470-471, 926 P.2d 1314, 1317-1318 (Ct. App. 1996), the Idaho Court of Appeals examined a similar situation as here, and ruled:

It is thus apparent that Swisher’s alleged claims for post-conviction relief were time-barred more than a year before his application was filed. The action is therefore frivolous. Swisher’s counsel on appeal has not identified any steps that could have been taken by an attorney, if counsel had been appointed to represent Swisher before the trial court, that might have prevented

⁵ If the rule suggested by Judd were adopted, an order denying a request for the appointment of counsel would be proper if it was filed a day before an order to dismiss the post-conviction petition. In cases where, as here, the two rulings were contained in the same order, a reversal and remand to cure such alleged defect would merely result in a staggered filing of separate orders.

dismissal of this action. After having independently reviewed the record, we can perceive no substantial rights of Swisher that were or might have been impaired by the trial court's oversight in failing to make a timely ruling on Swisher's request for counsel. Accordingly, we conclude that the district court's failure to consider Swisher's motion for appointed counsel before dismissing his action was harmless error.

As was true in Swisher, there was nothing an attorney could have done in Judd's case to make his post-conviction petition timely, or to excuse its untimeliness. Judd attempted to excuse the late filing of his petition by asserting his three ineffective assistance of counsel claims were, in essence, based upon newly discovered evidence. (R., p.15 (alleging he learned of trial counsel's failures during a meeting with a local contract attorney in January of 2007, "and that is why the petitioner has waited as long as he has to file this motion").) A free review of Judd's petition shows he has not alleged facts that raise the possibility of a valid claim.⁶ In Evensiosky v. State, 136 Idaho 189, 191, 30 P.3d 967, 969 (2001), the Idaho Supreme Court made clear, "There is no discovery exception in I.C. § 19-4902, I.C. § 19-4902 expressly limits a party's time to bring a claim for post-conviction review to one year."⁷ In Schwartz v. State, 145

⁶ Although the district court did not specifically address Judd's explanation for the untimely filing of his post-conviction claims, it implicitly rejected Judd's excuse. See State v. Kirkwood, 111 Idaho 623, 625, 726 P.2d 735, 737 (1986) (The implicit findings of the trial court should be overturned only if not supported by substantial evidence); State v. DuVal, 131 Idaho 550, 553, 961 P.2d 641, 644 (Ct. App. 1998) ("[A]ny implicit findings of the trial court supported by substantial evidence should be given due deference.").

⁷ I.C. § 19-4209(a) states in relevant part: An application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later.

Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008), the court of appeals explained:


The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902(a). The appeal referenced in that section means the appeal in the underlying criminal case. *Freeman [v. State]*, 122 Idaho [627] at 628, 836 P.2d [1088] at 1089 [(Ct. App. 1992)]. The failure to file a timely application is a basis for dismissal of the application. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). However, if an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period if "the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." I.C. § 19-4908. See also *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007).

Consequently, and as the district court implicitly recognized, Judd's post-conviction petition was untimely and appointed counsel could not have done anything to counter that fact. Because Judd's post-conviction claims are barred procedurally they are also frivolous, and Judd was not entitled to appointment of counsel to pursue those claims. See *Swisher*, 129 Idaho 467, 470, 926 P.2d 1314, 1317 (Ct. App. 1996) (post-conviction petition procedurally barred, petitioner's action was frivolous, and any error in failing to appoint counsel was harmless). Judd has failed to demonstrate any error or possible prejudice in the district court's order denying his motion for the appointment of counsel and dismissing his post-conviction petition.

CONCLUSION

The state respectfully requests that the district court's order denying Judd's request for post-conviction counsel and dismissing his petition for post-conviction be affirmed.

DATED this 23rd day of December 2008.



JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of December 2008, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

HEATHER M. CARLSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.


John C. McKinney
Deputy Attorney General

JCM/pm